

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES DUPREE,

Defendant Below,  
Appellant,

v.

STATE OF DELAWARE,

Appellee.

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No. 159, 2022

Court Below—Superior Court  
of the State of Delaware

Cr. ID No. 2002007001 A & B (N)

Submitted: January 11, 2023

Decided: April 4, 2023

Before **SEITZ**, Chief Justice; **VALIHURA**, and **VAUGHN**, Justices.

**ORDER**

On this 4<sup>th</sup> day of April 2023, it appears to the Court that:

(1) The Defendant-Appellant, James Dupree, appeals his convictions in Superior Court of: Sexual Abuse of a Child by a Person in a Position of Trust, Authority or Supervision in the Second Degree; Unlawful Sexual Contact in the First Degree (two counts); Dangerous Crime Against a Child; and Sex Offender Unlawful Sexual Conduct Against a Child. He makes two claims which he articulates as follows:

The trial court committed plain error by directing the jury to apply the commonly accepted meaning of “Sex Offender” instead of the statutory definition, and by directing the jury to determine if the State proved Dupree

was a sex offender in 2007, when in fact, the State needed to prove Dupree was a sex offender in 2018[; and]<sup>1</sup>

The judge deprived Dupree of his right to a fair trial by refusing to enforce any rules, constitutional or otherwise, implicated by the State's evidence presentation, unless there was an objection, and instead assuming, without basis, that all objectionable evidence was beneficial to Dupree.<sup>2</sup>

For the reasons that follow, we have concluded that the judgment of the Superior Court should be affirmed.

(2) In a prior case in 2007, the defendant pled guilty to a charge of Unlawful Sexual Contact in the Second Degree. He was sentenced to six months of incarceration followed by probation. As a condition of sentencing, he was required to register as a Tier 2 sex offender. This prior conviction is relevant to the charge in this case of Sex Offender Unlawful Sexual Conduct Against a Child.

(3) Between March and May 2018, the defendant entered into a relationship with a woman, C.P.<sup>3</sup> C.P. had two daughters: O.P. and A.P. In May 2018, the defendant moved in with C.P. and her daughters, but moved out by November of that same year. C.P. ended the relationship a month later, in December.

(4) The events surrounding this appeal appear to have occurred one day in November 2018. On that day, C.P., O.P., and A.P. traveled in C.P.'s minivan to pick

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<sup>1</sup> Opening Br. at 9 (emphasis omitted).

<sup>2</sup> *Id.* at 16 (emphasis omitted).

<sup>3</sup> The child victim, her mother, and her sister in this case are referred to by way of pseudonyms pursuant to Supr. Ct. R. 7(d).

up the defendant. Typically, when the four travelled together, C.P. would drive, the defendant would sit in the front passenger seat, and A.P. and O.P. would ride in the backseat. This time, A.P. sat in the front passenger seat next to her mother who was driving. The defendant sat behind C.P. and O.P. sat next to him in the minivan's "captain's chairs[.]"<sup>4</sup> The four were traveling to get gas and then to drop the defendant off at his cousin's house.

(5) The defendant did not want to sit in the backseat. He was angry and agitated when the group was at the gas station. He yelled at C.P. and A.P. The defendant started walking and C.P. followed the defendant in her car and he eventually returned, again riding in the backseat behind C.P.

(6) C.P. testified at trial that in the rearview mirror she "could see the whole outside the back window and like the top of [O.P.]'s head."<sup>5</sup> A.P. was busy adjusting the radio and playing on a phone while the group traveled. O.P. was playing on her phone.

(7) O.P. testified that while the defendant was seated in the backseat of the minivan, next to O.P., he touched her breasts over top of her clothing; touched her vaginal area; put his hand down her pants; and attempted to put his finger into her vagina. O.P. testified that she "was frozen"<sup>6</sup> when the defendant was touching her,

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<sup>4</sup> App. to Opening Br. at A112.

<sup>5</sup> *Id.* at A118.

<sup>6</sup> *Id.* at A159.

and that she tried unsuccessfully to get her sister's attention. O.P. testified that she did not try to get her mother's attention because "[w]e wouldn't want to cause an accident[.]"<sup>7</sup> The defendant did not speak to O.P. at this time, except for some commentary about the game on O.P.'s phone. O.P. was twelve at the time.

(8) Shortly after C.P. broke up with the defendant, O.P. told her that the defendant had touched her inappropriately. O.P. testified that she delayed telling her mother and sister about the defendant's actions until after the breakup because she wanted to protect them. O.P. told her mother that she delayed disclosing the abuse because she felt her mother was happy in the relationship and O.P. did not want to interfere.

(9) As a result of O.P.'s accusation, the defendant was indicted by a grand jury for the five above-described crimes. The first four charges: Sexual Abuse of a Child by a Person in a Position of Trust, Authority or Supervision in the Second Degree; Unlawful Sexual Contact in the First Degree (two counts); and Dangerous Crime Against a Child, were tried together before a jury. The defendant was convicted of all four charges. This phase of the defendant's trial is administratively referred to as the A case. The fifth charge, Sex Offender Unlawful Sexual Conduct Against a Child, was then immediately tried before the same jury and the defendant was convicted of that charge as well. This second part of the trial is administratively

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<sup>7</sup> *Id.* at A160.

referred to as the B case. This two-phase approach was taken so as to avoid the prejudice to the defendant of informing the jury that Dupree had a prior sex offense when the jury considered the first four charges.

(10) The defendant's first claim is that there was error in the jury instructions that were given on the charge of Sex Offender Unlawful Sexual Conduct Against a Child.<sup>8</sup> This claim goes only to the B case. The "Sex Offender" charge tried in the B case is under a statute that provides that "[a] sex offender who knowingly commits any sexual offense against a child is guilty of sex offender unlawful conduct against a child."<sup>9</sup> The phrase "sex offender" is defined in 11 *Del. C.* § 4121.<sup>10</sup> It is set forth in seven subparagraphs which make extensive reference to Delaware and federal criminal statutes covering sex offenses.<sup>11</sup>

(11) The court informed the jury that all of the evidence in the A case was also evidence in the B case. The only additional evidence introduced by the State in the B case was certified copies of the indictment in the prior case in which the defendant pled guilty to Unlawful Sexual Contact in the Second Degree in 2007, the plea agreement in that case, and the Superior Court docket entries in that case. The plea agreement includes as a condition "Tier 2 sex offender registration[.]"<sup>12</sup>

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<sup>8</sup> Opening Br. at 9.

<sup>9</sup> 11 *Del. C.* § 777A(a).

<sup>10</sup> See 11 *Del. C.* § 4141(a)(4).

<sup>11</sup> See *Id.*

<sup>12</sup> App. to Opening Br. at A302.

(12) In the B case the prosecutor made a brief opening statement without objection, which included the following pertinent comments:

So the defendant -- you will hear evidence the defendant resolved the case previously to -- by pleading guilty to one count of unlawful sexual contact in the second degree. The basis of that charge is there was a child victim under the age of 16, sexual contact occurred. By accepting that plea, there was a conviction for him. He is required currently to register as a sex offender by law and by the order of the Court. So you will get a document that will explain a little bit more about that and you'll have to render a verdict regarding that charge.<sup>13</sup>

Defense counsel waived the making of an opening statement and neither side made a closing argument.

(13) After the introduction of the documents just mentioned in the B case and the waivers of closing arguments by both the State and the defendant, the trial judge informed the jury that the legal instructions given in the A case also applied in the B case. He then instructed the jury as to the offense of Sex Offender Unlawful Sexual Conduct Against a Child. In pertinent part, the instruction informed the jury that:

You must now determine beyond a reasonable doubt whether Mr. Dupree at the time of the offense that you've just found him guilty [of] was a person that was registered or required to register as a sex offender under the laws of this state, another state, the United States, or any territory of the United States, and you must find at the time of the offense the victim was less than 14 years of age.<sup>14</sup>

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<sup>13</sup> *Id.* at A286-87.

<sup>14</sup> *Id.* at A293.

(14) The error in the instructions in the B Case, the defendant claims, was threefold: (1) the jury instructions did not define the term “sex offender” according to statute; (2) the jury was instructed to use the commonly accepted meaning of the term “sex offender” since it was not defined by the court; and (3) the jury was instructed to determine whether the defendant was a sex offender in 2007, when it should have been instructed to make this determination as to the time of the offense against O.P.<sup>15</sup>

(15) The defendant concedes that he did not raise this claim below.<sup>16</sup> This Court has held that when a party did not object to a jury instruction, we will “review[] the content of jury instructions for plain error.”<sup>17</sup> “Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”<sup>18</sup> “[T]he doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”<sup>19</sup>

(16) It is true that in the B case the court did not instruct the jury as to the specific definitions of “sex offender” contained in the Delaware Code. It is also true

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<sup>15</sup> Opening Br. at 10-11, 13.

<sup>16</sup> *Id.* at 9.

<sup>17</sup> *Brooks v. State*, 40 A.3d 346, 351 (Del. 2012) (en banc).

<sup>18</sup> *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (en banc).

<sup>19</sup> *Id.*

that the effect of the combined instructions from the A case and the B case was to inform the jury that it should give the term “sex offender” its commonly accepted meaning. The plain error standard of review, however, is fatal to the defendant’s first claim. Plain error exists only where an error clearly deprives an accused of substantial rights or clearly shows manifest injustice.<sup>20</sup> Neither is present here. Defense counsel’s decision not to make either an opening statement or a closing argument in the B case was an apparent recognition that the defendant had no defense in the B case and his guilt on the charge of Sex Offender Unlawful Sexual Conduct Against a Child was clear and beyond dispute. There is no plain error as to the defendant’s first claim.

(17) The defendant’s second claim is that the Superior Court committed error by not *sua sponte* preventing the admission of hearsay testimony,<sup>21</sup> an act the defendant characterizes as a “refus[al] to enforce any rules, constitutional or otherwise, implicated by the State’s evidence presentation, unless there was an objection, and instead assuming, without basis, that all objectionable evidence was beneficial to [the defendant].”<sup>22</sup> This error, the defendant contends, “deprived [him] of his right to a fair trial[.]”<sup>23</sup> The defendant argues that the court had an obligation to enforce hearsay rules by *sua sponte* preventing the admission of hearsay

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<sup>20</sup> *Id.*

<sup>21</sup> Opening Br. at 18-19, 21.

<sup>22</sup> *Id.* at 16 (emphasis omitted).

<sup>23</sup> *Id.* (emphasis omitted).

testimony,<sup>24</sup> and that this “affirmative decision to not enforce the rules”<sup>25</sup> was a structural error, as it is a “flaw in the process itself”<sup>26</sup> and “an abandonment of the process upon which fairness relies.”<sup>27</sup> As with the first of the defendant’s claims, he concedes that he did not raise this claim below.<sup>28</sup>

(18) Since the defendant’s second claim was not raised below, we review the Superior Court’s claimed non-objection to hearsay testimony for plain error.<sup>29</sup> The decision of the Superior Court not to intervene in hearsay testimony at trial was not plain error. The record shows that some discussion occurred between the trial judge and the State about hearsay evidence. The State asserted that “there was some hearsay evidence testimony that came forward” and indicated a desire to “make a record of that[.]”<sup>30</sup> The judge replied, stating “I don’t make objections for parties and I assume that the information concerning [A.P.] was beneficial to the defendant and so that’s why [defense counsel] wasn’t objecting to the hearsay.”<sup>31</sup> After back and forth with the State, the judge explained, “I listened to what it was and realized

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<sup>24</sup> *Id.* at 19, 21.

<sup>25</sup> *Id.* at 22.

<sup>26</sup> *Id.* at 21.

<sup>27</sup> *Id.* at 22.

<sup>28</sup> *Id.* at 16 n.19.

<sup>29</sup> The defendant claims that the Superior Court’s decision not to object *sua sponte* to enforce hearsay rules was a structural error which should not be subjected to the harmless error test. Opening Br. at 16. There is no structural error here and thus the standard of review for structural error need not be addressed.

<sup>30</sup> App. to Opening Br. at A205.

<sup>31</sup> *Id.*

it was helpful to the defense so I figured that's why you weren't objecting.”<sup>32</sup> This discussion about the hearsay testimony occurred without any comment from defense counsel on the matter.

(19) The defendant claims that the court's actions were indicative of structural error because they were “a trial judge's willful refusal to engage in the requisite oversight of a jury trial[.]”<sup>33</sup> Structural errors, the defendant asserts, “by definition ‘defy analysis by harmless-error standards’ and require reversal.”<sup>34</sup>

(20) This Court discussed “structural error” in *Brice v. State*. We noted that “Structural errors affect the framework within which the trial proceeds, as opposed to being simply an error in the trial process itself.”<sup>35</sup> As stated in *Brice*, six circumstances have been identified in which the United States Supreme Court has indicated that error is structural, and this case mirrors none of them.<sup>36</sup> The error claimed here—the court's failure to intervene *sua sponte* to prevent the admission of hearsay evidence in the absence of an objection by defense counsel—neither mirrors

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<sup>32</sup> *Id.* at A206.

<sup>33</sup> Opening Br. at 22.

<sup>34</sup> Reply Br. at 6 (quoting *Brice v. State*, 815 A.2d 314, 324 (Del. 2003) (en banc) (internal quotation marks omitted) (citations omitted) (*overruled on other grounds by Rauf v. State*, 145 A.3d 430 (Del. 2016) (en banc))).

<sup>35</sup> *Cabrera v. State*, 173 A.3d 1012, 1022 n.32 (Del. 2017) (en banc) (internal quotations marks omitted) (quoting *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1909 (2017) (citations omitted)).

<sup>36</sup> *Brice*, 815 A.2d at 324-25 (Del. 2003) (*overruled on other grounds by Rauf*, 145 A.3d 430) (The six circumstances the *Brice* court identified included: (1) “total deprivation of the right to counsel[;]” (2) “an impartial judge[;]” (3) “unlawful exclusion of the defendant's race from a grand jury[;]” (4) “the right to self-representation[;]” (5) “the right to public trial[;]” and (6) defective reasonable doubt instruction[.]”); see Answering Br. at 21-22.

any of the six structural errors identified by this Court nor affects the trial framework.<sup>37</sup> Structural error does not exist here. The trial court commented that it appeared that defense counsel's decision not to object to hearsay evidence appeared to the court to be a strategic decision of defense counsel. The court's conduct was not, as the defendant puts it, an "abdication of . . . responsibility[.]"<sup>38</sup> Since no structural error is present here, plain error is the standard by which the actions of the trial court will be considered.

(21) Attorneys often make strategic decisions when it comes to objection or nonobjection to evidence. It was not plain error in this case for the trial court not to intervene in the admission of hearsay evidence. The judge noted that defense counsel appeared to have made a strategic decision not to object to the evidence. The discretion of a judge to object *sua sponte* to inadmissible hearsay evidence is long established in Delaware.<sup>39</sup> While judges have the discretion to object to inadmissible testimony when parties fail to do so, the exercise of this discretion is not ordinarily an obligation. Even the defendant concedes that "this Court has never suggested, and Dupree is not arguing, that trial judges are required to exclude all objectionable evidence *sua sponte*."<sup>40</sup> The lack of intervention to the admission of hearsay evidence by the trial court in this instance did not "jeopardize the fairness

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<sup>37</sup> See *Id.*; see *Cabrera*, 173 A.3d at 1022 n.32.

<sup>38</sup> Opening Br. at 19.

<sup>39</sup> *S. Atl. S.S. Co. of Del. v. Munkacsy*, 187 A. 600, 606 (Del. 1936).

<sup>40</sup> Opening Br. at 20 (citation omitted).

and integrity of the trial process.”<sup>41</sup> There was no plain error.

NOW, THEREFORE, it is the order of the Court that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ James T. Vaughn, Jr.  
Justice

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<sup>41</sup> *Wainwright*, 504 A.2d at 1100.